IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 879

SOUTHERN PACIFIC COMPANY,
a railroad corporation, Intervener,
Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,
Respondents.

No. 909

WALTER E. MEYER, Intervener,
Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,
Respondents.

No. 936

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a Corporation, Debtor,
Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT

The respondent, Guaranty Trust Company of New York, Trustee under the Debtor's First Terminal and Unifying Mortgage, files this brief in support of its prayer

that this Court deny the petitions of the Debtor, Southern Pacific Company and Walter E. Meyer requesting this Court to review the decision of the Circuit Court of Appeals for the 8th Circuit affirming the District Court's order approving a plan of reorganization for the St. Louis Southwestern Railway Company.

Opinions Below

District Court—53 F. Supp. 914 (R. 5183-5213)
Circuit Court of Appeals—152 F. (2d) 337 (R. 5559-5683)

Jurisdiction

The petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347(a)), and Section 24(c) of the Bankruptcy Act (11 U. S. C. Sec. 47(c)).

The Property Involved

The St. Louis Southwestern Railway system lines comprise a group of railroads operating with main lines and branches from St. Louis, Missouri, and Memphis, Tennessee, to Shreveport, Louisiana, and points in Texas, the principal termini in Texas being at Corsicana and Fort Worth. The total road mileage operated by the system when the reorganization proceedings commenced was 1,749 miles. The Commission has found that traffic on the Debtor's main line is "highly competitive", and that its branch line traffic is "very light" (R. 3502). The Debtor must compete for traffic in the Southwest area with the Missouri-Pacific, St. Louis-San Francisco, Missouri-Kansas-Texas, and Kansas City Southern Railroads (R. 5581).

Statement of the Case

This proceeding was begun on December 12, 1935, when the Debtor filed its petition under Section 77 of the Bankruptcy Act. Similar petitions were filed by Debtor's three

subsidiaries, St. Louis Southwestern Railway Company of Texas, Central Arkansas and Eastern Railroad Company and Stephenville North and South Texas Railway Company. All objections to the Debtor's petition were overruled, and on January 3, 1936, one Trustee was appointed for the four Debtors.

Hearings on the plans of reorganization filed by the Debtor and others were begun March 16, 1937, and concluded April 24, 1937. The Examiner's Proposed Report was issued February 7, 1938, and objections thereon were argued before the Commission on May 16, 1938.

On January 10, 1939, the Commission reopened the proceedings for the purpose of receiving further evidence relating to the charges made by petitioner Meyer with respect to the effect upon the Debtor's earnings and assets of Southern Pacific's alleged diversion of traffic and failure to solicit traffic preferentially (R. 500-501). Thereafter, hearings were held for this sole purpose from May 5, 1939, to May 27, 1939, and from September 18, 1939, to September 30, 1939 (R. 529). At these hearings a vast amount of evidence, including hundreds of exhibits, was introduced (R. 529-2680, 2681-3055). The extensive record made at these hearings contained exhaustive studies of the earnings history of the Debtor upon which the Commission founded its finding as to the Debtor's prospective earning power.

On June 30, 1941, the Commission issued its initial Report and Order setting forth its plan of reorganization for the Debtor (R. 3495-3735; 249 I. C. C. 5). 131 pages of the Report are devoted to an elaborate consideration and rejection of the Meyer charges (R. 3547-3678). The plan reduced the Debtor's total capitalization from approximately $107,000,000 to $75,000,000 and fixed charges from approximately $3,400,000 to $1,500,000.

Petitions for modification of the plan were filed by various interveners, and on March 9, 1942, the Commission issued its Supplemental Report and Order, which modified its original plan in certain relatively minor respects but which reaffirmed the same so far as the present petitions

are concerned (R. 3736-3820; 252 I. C. C. 325). The modified plan was certified by the Commission to the District Court March 23, 1942 (R. 3494-3495).

From October 26, 1942, to November 5, 1942, hearings were held before the late Judge Davis upon objections to the certified plan at which additional evidence, including data as to the vastly increased earnings of the preceding two years, was presented (R. 4051-5136). The great bulk of such additional evidence related to the charges made by Walter E. Meyer against Southern Pacific (R. 4157-4199, 4202-4209, 4304-5136). Prior to the filing of briefs in support of the plan and objections thereto, Judge Davis died. The case was then referred to Judge Moore (R. 5138) who on April 23, 1943, entered an order directing a reargument on May 31, 1943, upon the case as submitted before Judge Davis, with all parties having the right to apply for leave to present additional testimony (R. 5181-5183). On February 8, 1944, the District Court filed an opinion and entered an order in which it rejected the contentions of the objectors and approved the certified plan.

Appeals were taken in March, 1944, to the Circuit Court of Appeals for the 8th Circuit by Southern Pacific, Walter E. Meyer, protective committees for the Stephenville and Central Arkansas bonds, respectively, and the Debtor, but due to the necessity of printing an inordinately voluminous record, argument was delayed until April 6, 1945. The Circuit Court handed down its decision August 26, 1946.

The Plan of Reorganization

Since the primary complaint of petitioners is not as to the terms of the Commission's plan of reorganization, but as to its alleged obsolete character, no elaborate discussion of the terms of the plan is required. It will suffice to say that the Commission's plan of reorganization for the Debtor calls for a capitalization of approximately $75,000,000 and fixed charges of approximately $1,500,000. The Debtor's

capitalization at the time it went into reorganization was $107,124,950, and fixed charges were, $3,379,341. (R. 3506, 3691)

Questions Presented

Only two questions are presented by the petitions for writs of certiorari:

First, whether changed conditions have occurred which were unanticipated by the Commission and which warrant review by this Court.

Second, whether the Commission has given proper consideration and disposition to petitioner Meyer's special charges of illegal control of the Debtor by Southern Pacific.

POINT I

The Petitioner's allegations regarding changed conditions do not warrant a return of the plan to the Commission.

In final analysis, the petitions for review by this Court of the fairness of the Commission's plan of reorganization for the Debtor are based primarily on the theory of changed conditions. This theory is rested upon two basic premises: one, that the reduction in the Debtor's defaulted interest obligations and other indebtedness and the increase in its current asset position has rendered the Debtor solvent; and two, that the Debtor has shown an earning power unanticipated by the Commission. Respondents believe that the first premise is contrary to the principles laid down by this Court and that the second can not be sustained on the meager additions to the record offered with the petitions, being a mere assertion by the petitioners as opposed to the expert judgment of the Commission.

The Petitioner's Theory Of Solvency Of The Debtor Is Unsound

All three petitioners rely heavily upon an alleged solvency of the Debtor in the bankruptcy sense resulting from cash distributions directed by the District Court and from

an improvement in the current asset position of the Debtor. As petitioner Southern Pacific states it: "The case for the present solvency of the Debtor is presented upon the basis of reduction in debt and improvement in current liquid assets" (Petition p. 8). Respondents believe that the fallacies in the position of petitioners lie in their disregard of the principles settled by this Court as to the effect of debt reduction and increase in current assets after the effective date of a plan, in their misconception of the significance of the Commission's proposed new total capitalization, and in their failure to analyze the effect of cash distributions under the plan.

(a) The decrease in debt and increase in current assets is for the benefit of the new security holders.

The effective date of the plan of reorganization in these proceedings is January 1, 1942. This Court has consistently held that it is for the Commission alone to determine the effective date of a plan of reorganization. *R. F. C.* v. *Denver & Rio Grande Western R. R. Co.*, 90 L. Ed. 1134, p. 1148; *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 509; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 546. The practical reason for this ruling was well stated by the Circuit Court of Appeals for the Second Circuit in *Old Colony Bondholders* v. *New York, New Haven & Hartford Railroad Company*, C. C. H. Bankruptcy Service, Par. 55,813 January 13, 1947, where the Court said (p. 58,527):

> "* * * As a practical matter some closing time must be set and it cannot be progressively postponed without reopening the issues and making new findings, with resulting new appeals. By the time these are finished conditions may again have changed, so on *ad inifinitum*. See *Interstate Commerce Comm.* v. *Jersey City, supra,* * * *"

Starting with this premise in the *Denver* case, this Court laid down the principles with respect to the effect of

reduction in debt and increase in current assets in a reorganization proceeding subsequent to the effective date which, respondents submit, govern the issues petitioners now seek to raise.

Petitioners' primary argument of changed conditions is founded on actual and assumed reductions of debt funded in the plan resulting from cash distributions made since the effective date of the plan. However, this same argument was made before this Court in the *Denver* case and rejected. There the effective date of the plan was January 1, 1943. Among the obligations of the Debtor funded in the plan as of that date were $2,758,330 of Rio Grande Junction Bonds. In addition, the plan provided for the assumption by the reorganized company of $5,758,000 of equipment obligations. Subsequent to the effective date the District Court authorized the Trustees to purchase the Junction Bonds and to pay off $1,218,000 of the equipment obligations. The capitalization of the new company was decreased proportionately. The Trustee for the most junior secured creditors protested that their participation should be increased by the amount of the debt reduction. The Circuit Court of Appeals for the Eighth Circuit accepted this argument and returned the plan to the District Court. This Court granted *certiorari* and reversed the Circuit Court on this point, stating (90 L. Ed. p. 1724):

> "* * * When the reduction of senior capital takes place after the adoption of the plan by use of anticipated earnings or existing cash, there can be no such readjustment of junior participation because assets in the balance sheet at the adoption of the plan and subsequent earnings are, as we have pointed out, for the benefit of the stockholders in the new company so that through these common stock advantages these new stockholders may be compensated for their loss of payment in full in cash. * * *."

So too in the instant case the reduction of debt after the adoption of the plan is for the benefit of the new security holders. As the table on page 9 of the petition of Southern

Pacific shows, precisely the same kind of debt reduction has occurred, in part at least, in this case as in the *Denver* proceeding. Here guaranteed obligations, viz. the Texarkana Union Station certificates, were purchased and a reduction in equipment obligations effected. A secured obligation of the Railroad Credit Corporation was also paid off, which was contemplated and provided for in the plan. As this Court held in the *Denver* case, the benefit of this action accrues to the new security holders. In addition, in this proceeding funds sufficient to pay interest arrears on certain senior securities, but not directed to be applied for that purpose, were disbursed. But this does not affect the application of the doctrine enunciated by this Court in the *Denver* case to this proceeding. Under that doctrine if these payments also effected a reduction in debt after the effective date such reduction must be for the benefit of the new security holders.

Furthermore, under an additional holding of this Court in the *Denver* case, it appears plain that the cash from which these payments were made belongs to the creditors provided for under the plan, because it was acquired subsequent to the plan's effective date. In the *Denver* proceeding this Court stated (90 L. Ed. p. 1146):

> "There is another important factor, corollary to stock ownership, to be noted in the Commission's allocation of these securities. *This factor is that the creditors who received common stock to make them whole obtained with that common stock an interest in all cash on hand or all cash that might be accumulated.* * * * Cash, material and supplies, as well as all other assets and all liabilities of the debtor were represented by the securities. If there is more cash on hand than needed, for taxes, expenses and proper improvements, it is at the disposal of the common stockholders. If money was used to pay indebtedness, there would be a corresponding reduction in the capital structure. * * *" [Emphasis supplied].

The Circuit Court of Appeals in that case had said (150 F. (2d) at p. 35):

> " • • • we cannot disregard the fact that these huge surpluses actually exist. Their existence is an accomplished fact. It is also obvious that surpluses will continue to pile up for a reasonable time yet to come. We think any plan which fails to take this into account and which gives the Senior Bondholders their claims in full by substantially delivering the road to them, and gives them the surplus cash actually on hand and further enables them to receive in addition the excess war profits which are reasonably sure to come, is inherently inequitable and unfair, so long as there are classes of creditors whose claims are not fully satisfied."

As to this holding, this Court stated (90 L. Ed. p. 1148):

> "In our judgment this holding is erroneous.
>
> The effective date of the plan was fixed by the Commission as January 1, 1943. This was in its power. The allocation of the securities took into consideration the interest of the secured claims to that date. *Any gain or any loss after that time was a benefit or an injury to the new common stockholders and then sometimes to security holders in positions senior to them.* Assuming that the courts, as courts with equity powers in a bankruptcy matter, might set aside a plan, fair and equitable when adopted by the Commission, merely on account of subsequent changes in economic conditions of the region or the nation, it should not be done when the changes are of the kind that were envisaged and considered by the Commission in its deliberations upon or explanations of the plan" (Emphasis supplied).

The Commission in this case, as in the *Denver* reorganization, did envisage the factors upon which petitioners rely in their claim of changed conditions. At the time of its Supplemental Report in this proceeding the Commission had before it the Trustee's statements (which are filed regularly with the Commission) showing earnings avail-

able for fixed charges for 1940 of $2,860,221 as compared with $1,119,158 for 1939 and $7,495,940 for 1941 as compared with both those earlier figures. The Trustee's reports also showed an increase in net current assets over those existing when the petition was filed from a deficit of $23,771,707 to an excess of current assets over current liabilities of $8,010,813 as of December 31, 1941 (Debtor's petition p. 9). The Commission was fully aware of the certainty of further increases resulting from war earnings. In the face of these facts the Commission said:

> "• • • the new securities, in the amounts in which they will be exchanged for the securities and claims of the old company, properly compensate the holders of the old securities for the rights given up by them, *by the rights and shares of earnings accorded them in the new company.* • • • " (Emphasis supplied.) R. 3776)

Thus, the Commission plainly contemplated in this proceeding, as in the *Denver* case, that a part of the compensation of creditors for their sacrifices consisted of participation in good earnings in prosperous years and an improvement in the value of the securities issued them resulting from increased assets. It follows, therefore, that the arguments of the petitioners based upon an alleged increase of assets are directed to matters which this Court has held lie within the province of the Commission.

(b) The Commission's permissible total capitalization of $75,000,000 does not afford a basis for determining a balance sheet solvency.

A fundamental error in the solvency argument of the petitioners lies in their use of the figure of $75,000,000 as a starting point in setting up a balance sheet of assets and liabilities. The Commission's valuation in the form of a permissible capitalization was based not upon the value of the Debtor's various assets as of any specific date, but rather upon an overall valuation for reorganization pur-

poses, which was arrived at after consideration of "all the data of record" including "traffic and earnings to the latest available date" and "also future prospects of traffic and earnings" (R. 3741, 3774-75). Thus this valuation takes into consideration the prospect of large wartime earnings and the increase in the current asset position of the Debtor, which the Commission was aware would ensue. The war earnings for rail carriers were well known to the Commission by March 9, 1942, when it filed its Supplemental Report, as shown by its pertinent references thereto in its Annual Report for 1941, pp. 1-2, and the Commission took these factors into account in making its determination of a permissible capitalization. The permissible capitalization fixed by the Commission rested upon its informed judgment, taking into consideration estimated improved current asset position and earning power. This capitalization cannot be considered as an exact valuation of assets at any specific date.

This Court has recognized that earning power is the primary criterion in determining capitalization for reorganization purposes rather than a balance sheet tabulation of assets and liabilities (*Milwaukee & Western Pacific* cases, *supra*). Whether or not junior securities are "without value" must depend primarily on earning power as this Court ruled in the *Milwaukee* case 318 U. S. p. 539:

> "* * * it [was not] necessary for the Commission to make a precise finding as to the value of the road in order to eliminate the old stock from the plan. A finding as to the precise extent of the deficiency is not material or germane to the finding of 'no value' prescribed by § 77 (e). * * * The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn."

The entire solvency argument of petitioners is based upon their assumption that the Commission made a finding of "the precise extent of the deficiency" when it fixed the new

capitalization. But the Commission only made an overall valuation for reorganization purposes taking into consideration the prospective earnings (R. 3741, 3774-75) and other factors to which petitioners point as changed conditions necessitating amendment of the plan. Thus it is inaccurate to use the Commission's permissible capitalization as a starting point for a series of calculations intended to show the Debtor's present solvency through accumulation of assets sufficient to make up the supposed deficiency. As this Court stated in *Insurance Group Committee et al.* v. *The Denver and Rio Grande Western Railroad Company et al.* (15 U. S. Law Week, p. 4192, Feb. 3, 1947):

> "When the Interstate Commerce Commission finds the value of a railroad system by any means, the correctness of the result cannot be mathematically proved or disproved. The difficulties of appraisal are multiplied by the necessity of looking into the future to estimate earnings. Earnings estimates are made with allowance for changing economic conditions."

(c) No changed conditions have resulted from the cash distributions since the plan's effective date warranting review by this Court.

Under the terms of the plan, the District Court may direct that cash distributions made to senior creditors after the effective date shall be applied to the reduction in part of their claims. Yet, even if the court so applies whatever amount of the cash distributed since January 1, 1942, may be necessary to reduce or eliminate the unpaid interest claims of senior creditors and the amount of common stock is increased as a result of payment of the Railroad Credit Corporation loan, as provided in the plan, $1,584,709 of creditors' claims will receive no treatment under the plan:

Total permissible capitalization		$75,000,000
Deduct*: Equipment Trust Obligations paid off....	216,000	
Texarkana Union Station certificates paid off	315,000	
Interest Paid prior to effective date Funded Under Plan	400,000	
	931,000	931,000
		74,069,000
First Mortgage 4s	20,000,000	
Grays Point Terminal 5s	500,000	
Shreveport Bridge 5s	450,000	
Second Mortgage 5s	3,042,500	
First Terminal 5s	8,063,000	
General and Refunding 5s.....	#39,557,500	
Stephenville 5s	** 2,843,294	
Central Arkansas 5s	** 1,197,435	
		75,653,709
		(d) 1,584,709

If $1,584,709 of creditor claims are still unprovided for under the plan, there have plainly been no changed conditions resulting from cash distributions which warrant review of the plan by this Court.

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* No provision is made in the plan for reallocation of these amounts after payment of these obligations.

** Includes unpaid interest to 1/1/42 and after deducting salvage money that has been distributed.

Including Refunding Bonds pledged because Commission's plan treats such bonds as reduced to possession and accords holders of pledged bonds same treatment as public holders of Refunding Bonds.

(d) Deficiency. Even if securities released by payment of Equipment Trust Certificates, Texarkana Union Station Certificates and interest prior to January 1, 1942 are reallocated there would still remain unsatisfied claims of over $600,000.

The fact that the amount by which the creditors fail of complete satisfaction in face amount of new securities is now comparatively small, is of no consequence. Even if each creditor could now receive the full face amount of his claim in an equal face amount of new securities, it by no means follows that he has been made whole or that such a drastic unforeseen change in conditions has occurred necessitating a return of the plan to the Commission. This Court's recent ruling in *Insurance Group Committee et al.* v. *The Denver and Rio Grande Western Railroad et al.*, 15 U. S. Law Week 4189, p. 4191 places the burden upon the petitioners to show that the new securities over-compensate the creditors for their sacrifices in order to establish changed conditions invalidating a plan:

> "The Commission made no finding that the cash value of the securities allocated to the senior creditors paid them in full. To justify the change of position of creditors from fully secured to partially secured creditors were given opportunities to participate in profits through common stock ownership with a chance at larger earnings than the Commission's forecast anticipated. We held the priority rule was satisfied by this type of allocation. This was explained by our decision on the last review. Slip opinion, *supra*, p. 15. The debtor has made no allegation, either in this effort for re-examination or before, that the existing cash value of the securities allotted any creditor has ever aggregated the amount of the creditor's claim against the debtor. We think the absence of such an allegation, of itself, demonstrates that the plan is not, because of excessive interest, unfair to the debtor or those for whom it is allowed to appear.
>
> Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a re-examination of the plan is without substantial support. See *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 541."

These petitioners have made no allegation and offer no proof to show that the creditors provided for under the plan have received more in value than the face of their claims. There is, then, no warrant for a review of the plan by this Court or a reconsideration of the plan by the Commission.

As a matter of record, the cash distributed to the creditors has not materially aided the Debtor in so far as its need for reorganization is concerned. As shown by the Debtor's balance sheet as of October 31, 1946, Appendix B to Southern Pacific's petition, it is still unable to meet its matured and maturing debts. The Debtor's matured principal obligations are $25,064,394. In addition the Debtor is obligated in the principal sum of $17,882,250 to Southern Pacific, which sum is now due. Its matured unpaid interest obligations are $3,247,284, excluding $1,443,540 interest in default on Southern Pacific's claim. There is the further obligation to pay current interest on the Debtor's first mortgage bonds and its equipment obligations. The Debtor has available to meet its matured and maturing debts, cash and temporary cash investments of $22,989,923 and total current assets of $32,545,847. Total current liabilities amount to $10,455,343, leaving $22,090,504 net current assets to meet matured and maturing obligations of $28,311,678 excluding Southern Pacific's matured claim of $19,325,790, principal and interest. If this sum be included, the Debtor's matured obligations are $47,637,468. It cannot be said, then, that the improved cash position of the Debtor and its debt retirement has placed it in any position to fully meet its matured or maturing obligations. It is, therefore, a proper subject for reorganization and the fundamental consideration under such circumstances in the formulation of a reorganization plan is the Debtor's prospective earning power. The Commission has found that the Debtor's normal earning power is insufficient to warrant a capitalization which permits participation by the equity or even full compensation of the creditors. As we point out below, petitioners have completely failed to present substantial evidence which would justify a finding that the Commission's conclusion in this respect was in error.

Even were the Debtor able and required to repay its interest arrears only and be relieved of its obligation to pay its matured principal debts, the problem for reorganization purposes would still remain its ability to meet its obligations as they mature. The obligations which Debtor would have to meet in fixed charges on its existing debt under its present capital structure would amount to $3,008,634 annually as shown by the Debtor's annual report for 1945. On the basis of the property's historical earnings record and all other factors the Commission has found that the Debtor has been and will be unable to meet such heavy fixed charges apart from its maturing principal obligations. The petitioners offer no reliable evidence to establish clear error in this determination.

Petitioners Have Made No Valid Showing Of Changed Conditions With Respect To The Debtor's Earning Power

The petitioners' second charge of inequity resulting from changed conditions is founded upon an alleged error in judgment on the part of the Commission in its determination of the prospective earning power of the Debtor. However, the only evidence cited in support of this claim is the 10 months earning statement of the Debtor for 1946, statistics showing an increase of population in the southwest territory, and a theoretical industrial expansion in that area. On these tenuous factors alone petitioners contend that this Court should set aside the considered judgment of the Commission as to the Debtor's normal earning power based upon a review of all relevant data together with its vast experience and familiarity with such matters. This inadequate record, consisting primarily of hopeful predictions by petitioners, presents no valid reason for this Court to review the determination of the Commission based upon its expert judgment. The allegations relied upon here with respect to the Debtor's earnings and earning power were presented to the Circuit Court as recently as October 22, 1946, when that Court denied petitions for rehearing. The Circuit

Court, sitting in and fully familiar with the alleged industrial and population expansion in the territory served by the Debtor, found nothing in the petitioners' allegations warranting a change in the Commission's plan. As recently as June 10, 1946, this Court considered and rejected almost identical arguments in the *Denver* proceeding.* On the basis of the proof offered in this proceeding they must likewise be rejected.

The petitioners rely almost entirely upon the ten months earning statement of the Debtor to contradict the Commission's determination as to the Debtor's prospective earning power. However, the figures themselves, while apparently favorable, may not be relied upon implicitly unless there is available the underlying data from which the result is derived. It is impossible to tell what non-recurrent income is contained in the ten months statement or to what extent tax carry back credits or inadequate maintenance provisions are responsible for the favorable statement. Furthermore from other aspects the Debtor's earnings picture has not been as optimistic. The Cotton Belt reported gross revenues for the full year of 1946 of $46.6 million representing a decline of 28% from 1945.** This is a substantially larger decline than that recorded by St. Louis-San Francisco, which showed a drop of only 17%, or by Missouri-Pacific which showed a decline of but 20%, both of which railroads are competitors of the Debtor. Class I railroads in general showed a decline of about 15%. The substantial decline in the Debtor's earnings may be attributed to the phenomenal rate at which the company's traffic increased during war years, since the Debtor showed one of the greatest percentages of increase of traffic among Class

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* This ruling was reaffirmed February 3, 1947. *Insurance Group Committee et al.* v. *The Denver and Rio Grande Western Railroad et al.*, 15 U. S. Law Week p. 4190.

** The source of the statistics cited herein is Moody's Railroads Service.

I railroads in the country for the war years. The peak traffic year of 1944 was for the Debtor 386% above its 1935-39 average as compared with 281% for the Missouri-Pacific, 270% for the St. Louis-San Francisco and 246% for Class I railroads generally. An important factor to bear in mind in reviewing the Debtor's war time earnings record is that during this period the Debtor's traffic "received from connecting lines" increased to 68% of its total traffic as compared with approximately 52% for years just prior to the war. There is plainly no certainty that the Debtor will continue to receive the very substantial increase in revenue from this form of traffic. Viewed in this light it would be wholly unsound to question the expert judgment of the Commission as to the Debtor's normal earning power merely on the strength of a ten months earning statement for 1946. Respondents submit that the petitioners have made no adequate showing to warrant review by this Court of the determinations of the three tribunals which have passed upon the question.

POINT II

The special charges of petitioner Meyer with respect to Southern Pacific's alleged illegal control of the Debtor present no questions for review by this Court.

Petitioner Meyer has renewed in his application to this Court the arguments he has made throughout this proceeding before the Commission (and subsequently before the District Court and Circuit Court of Appeals) of injurious control of the Debtor by Southern Pacific and other railroads. Principally, his contentions are that an alleged diversion of traffic from the Debtor and failure to solicit traffic preferentially distorted the Debtor's earnings record and, therefore, rendered the Commission's judgment of its prospective earning power erroneous. As a corollary to this

charge petitioner Meyer maintains that Southern Pacific's claim against the Debtor should be subordinated because of its breach of fiduciary duty to the Debtor. Nothing would be gained by a detailed review of the evidence before the Commission (or that introduced before the District Court) upon which the Commission rested its finding that Meyer's charges were without merit, which finding the District Court and Circuit Court have affirmed. Respondents believe it sufficient to point out that under the applicable decisions the charges of petitioner Meyer are not a proper subject for consideration by this Court.

In *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, this Court made the following statement of the basic rule of administrative law:

> "So long as there is warrant in the record for the judgment of the expert body it must stand. * * * 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-287; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303, et seq."
>
> (Quoted with approval in *I. C. C.* v. *Jersey City*, 322 U. S., page 513).

A like rule has been laid down in connection with railroad reorganization proceedings under Section 77 where the scope of judicial review of Commission findings upon certain matters committed to its exclusive jurisdiction was defined as limited to ascertaining the existence of material evidence supporting the Commission's ruling and the observance of legal standards. *Western Pacific* case, *supra*, 318 U. S. p. 473.

It is well settled that the control of one carrier by another is a matter committed to the exclusive jurisdiction of the Interstate Commerce Commission (*New York Central Securities Co.* v. *U. S.*, 287 U. S. 12, p. 26). The Commission

has given approval to the control of the Debtor by Southern Pacific (*St. Louis S. W. Ry. Control,* 180 I. C. C. 175). Under the doctrine of the foregoing cases, therefore, it must follow that the propriety of the exercise of such control is a matter also committed to the exclusive jurisdiction of the Commission. And if it is found that its determination with respect thereto rests upon a sufficient record, compiled after opportunity for hearing has been given, the area of permissible judicial review has been covered.

Plainly, the Commission's rejection of the charges of improper control in this case is founded upon an ample record with full opportunity to be heard. Petitioner Meyer introduced considerable evidence on the subject at the initial Commission hearing in March and April, 1937 (R. 168-212). From May 5th through May 27th and from September 18th through 30th, 1939, the Commission held hearings solely to hear evidence in connection with the Meyer charges. The record compiled on this matter alone exceeded 2,500 pages as well as hundreds of exhibits (R. 529-3055). That the Commission painstakingly reviewed and weighed this evidence is shown by its first report which, for the most part, is devoted to a discussion of the Meyer charges (R. 3547-3678). Meyer's objections to the Commission's findings in that report were considered and again rejected by the Commission in its supplemental report (R. 3742-3752). When the plan was certified to the District Court Mr. Meyer was permitted to adduce a formidable amount of additional evidence in support of his charges (R. 4157-4199, 4202-4209, 4304-5166). Both the District Court and the Circuit Court of Appeals reviewed this vast record, found it more than adequate and concluded that no evidence had been presented demonstrating palpable error in the Commission's findings. On the basis of this ample record and opportunity to be heard respondents believe that this Court's settled decisions preclude a review of the petitioner's special charges. The issues raised by Mr. Meyer "are matters requiring study by experts on railroad affairs, involving as they do, expert analysis of traffic movements, freight loadings, financial

statements and other data peculiarly within the comprehension of the I. C. C. . . . " (District Court opinion, 53 F. Supp. p. 927). They are clearly, therefore, not proper matters for consideration by this Court.

CONCLUSION

The petitions for certiorari should be denied.

Dated: February 10, 1947.

Respectfully submitted,

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